SUPREME COURT OF APPEALS OF VIRGINIA.

LACKS et al. *v.* LATHAM et al.

June 11, 1914.

[82 S. E. 75.]

1. Taxation (§ 765*)—Tax Deed—Seal.—A deed to land conveyed to the commonwealth for nonpayment of taxes, made and acknowledged by the clerk, was not invalid and incapable of passing title because it concluded: "Witness my hand and seal of the court. * * * E., Clerk. [Seal.]"—since the words "of the court" were superfluous and might be rejected, and, moreover, an entire omission to recognize the scroll as a seal in the body of the instrument would have been cured by its solemn recognition by the clerk at the time of acknowledgment for record; the writing being required by statute to be sealed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1523-1527; Dec. Dig. § 765.*]

2. Taxation (§ 761*)—Tax Sales—Resale by Commonwealth—Requisites of Deeds.—Under Code 1904, § 666, relative to the sale of lands sold for taxes to the auditor of public accounts for the benefit of the state, which requires that the deed shall set forth all the circumstances appearing in the clerk's office in relation to the sale, the circumstances to be set forth are those relating to the sale by the commonwealth to the applicant to purchase, and a failure to set forth the circumstances in relation to the tax sale did not render the deed invalid and incapable of passing title, especially in view of section 661, providing that when the purchaser of real estate, sold under section 666, has obtained a deed which has been duly admitted to record, the title shall stand vested in him, subject to be defeated only by proof that the taxes were not properly chargeable or were paid, that notice of the application to purchase was not duly given, or that payment or redemption of the real estate was prevented by fraud or concealment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509, 1510-1513; Dec. Dig. § 761.*]

Error to Circuit Court, Halifax County.

Ejectment by one Latham and others against one Lacks and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Guthrie & De Jarnette, of Houston, for plaintiffs in error.
Booker & McKinney, of Houston, for defendants in error.

WHITTLE, J. The defendants in error, plaintiffs below, brought an action of ejectment against the plaintiffs in error to recover a tract of 100 acres of land situated in Halifax county, Va. At the trial the plaintiffs asserted title to only one-half of the land, and there was a verdict and judgment in their favor for an undivided half only. To that judgment this writ of error was granted.

The entire tract of land was sold by the treasurer of Halifax county for delinquent taxes and purchased in the name of the auditor of public accounts for the benefit of the commonwealth. The land, not having been redeemed, was purchased by J. T. Lacks, under whom the defendants claim, who made application to the county court of the county at the January term, 1903, to be allowed to complete his purchase without a survey and report by the county surveyor. The court granted the motion, being of opinion that a sufficient description of the land to identify the same could be obtained from the records without additional survey and report, and dispensed with such survey and report, and ordered the clerk of the court to make the purchaser a proper deed to the land with covenant of special warranty. The deed was accordingly made by the clerk January 29, 1904, and duly acknowledged by him February 2, 1904, before a notary public, and admitted to record.

There are several subordinate assignments of error, but the action of the court in sustaining the plaintiffs' objection to the introduction of the clerk's deed in evidence is controlling, and alone demands special notice.

The grounds of objection to the deed are: (1) That it is not sealed; and (2) that it is invalid and incapable of passing title to J. T. Lacks because it does not comply with the requirements of section 666 of the Code in that it omits to set out "all the circumstances appearing in the clerk's office in relation to the sale."

[1] 1. The first ground of objection rests upon the fact that the deed concludes:

"Witness my hand and seal of the court, the day and year first above written. Thomas Easley, Clerk. [Seal.]"

Admittedly the instrument would have been free from objection if the words "of the court" had been omitted. Those words, it will be observed, are not necessary to give meaning to the paper, and neither their presence nor absence can affect its validity. They are, in short, merely superfluous, and may be rejected. Utile per inutile non vitiatur. Besides, the omis-

sion to recognize the scroll as a seal in the body of the instrument at all would have been cured by its solemn recognition by the grantor at the time of acknowledgment for record, inasmuch as the writing is required by statute to be sealed. Parks *v.* Hewlett, 9 Leigh, 511; Ashwell *v.* Ayres, 4 Grat. (45 Va.) 283; Clegg *v.* Lemessurier, 15 Grat. (56 Va.) 108; 2 Minor on Real Property, § 1139.

The rule is succinctly stated in 1 R. C. L. § 22, p. 261, as follows:

"One who acknowledges an instrument required to be under seal is deemed to adopt a seal affixed thereto by another's hand, just as effectually as he adopts the signature when written by another person, and for the same reasons."

We are unwilling to adopt a rule of construction, the effect of which would be to subordinate substance to form and defeat a substantial right upon a bare technicality, and especially as the better right is sustained by the better reason.

[2] 2. The second contention is that the clerk's deed to the purchaser is invalid because it does not comply with the requirements of section 666 of the Code and set out all the circumstances appearing in the clerk's office in relation to the sale.

In that connection a distinction is to be observed between the requirements of section 665 with respect to deeds by the clerk to land sold by the treasurer for delinquent taxes under sections 638 and 639 and purchased by parties other than the commonwealth, and the requirements of section 666 in regard to such deeds to land previously sold under section 638 and bought by the treasurer in the name of the auditor of public accounts for the benefit of the state, etc., under section 662, and which, not having been redeemed, is sold under section 666. In the former case the statute was construed in Coles *v.* Jamerson, 112 Va. 311, 71 S. E. 618. The requirement in each instance is that the deed shall "set forth all the circumstances appearing in the clerk's office in relation to the sale." But the circumstances with respect to the two classes of sales are essentially different. The "circumstances" referred to in section 666 mean the circumstances in relation to the sale made by the commonwealth to the applicant to purchase under that section. The section also declares that section 661 shall apply to deeds made under authority thereof; and the latter section provides that when the purchaser has obtained his deed, and it has been duly admitted to record, the title to the land shall stand vested in the grantee, "subject to be defeated only by proof, (one) that the taxes or levies for which said real estate was sold were not properly chargeable thereon; or (two), that the taxes and levies properly chargeable on such real estate have been paid;

or (three), that * * * notice of the application to purchase, * * * has not been duly given; or (fourth), that the payment or redemption of said real estate was prevented by fraud or concealment on the part of the purchaser." And the limitation to suits under that section, except for fraud, is two years. No such grounds of defeasance appear in this case. Thomas *v.* Jones, 94 Va. 756, 27 S. E. 813; Parsons *v.* Newman, 99 Va. 298, 38 S. E. 186; Va. B. & L. Co. *v.* Glenn, 99 Va. 460, 39 S. E. 136; Wright *v.* Carson, 110 Va. 498, 66 S. E. 37.

Prof. Minor in his work on Tax Titles thus distinguishes between sales under section 666 and the original tax sale:

"The commonwealth may do what it pleases with its own, and, if the Legislature sees fit to dispense with notice to the owner, it may dispose of its title privately. This constitutes the great difference between the notice required by law preliminary to the original tax sale, and that required as preliminary to the resale by the commonwealth. In the former case, the property is the owner's, and he cannot be deprived of it without notice; in the latter case the property is the state's, and the Legislature may dispense with notice altogether." Minor on Tax Titles, p. 84.

Again the learned author at page 85 says:

"The commonwealth will be deemed to have acquired the title at the time of the tax sale, and any subsequent omission of steps prescribed by statute will not invalidate that title; such steps being construed as merely directory. A resale, therefore, under this construction, would convey to the purchaser such title as the commonwealth has, not subject to be defeated by proof that any subsequent steps, so long as the state retains its title, have been omitted."

The deed in question complies with the requirements of section 666, and the trial court erred in refusing to admit it in evidence.

For the foregoing reasons, the judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial conformable to this opinion.

Reversed.

Note.

The validity of tax titles in Virginia is very exhaustively treated in an article by A. S. Lanier published recently in the Register (19 Va. Law Register 488). The constitutionality of that provision of § 661 of the Code providing that no suit shall be brought to set aside, cancel or annul such deed, except for fraud as therein provided, unless within two years after the same is duly admitted to record in the county or corporation where the real estate is situated, is discussed, and it is pointed out that our Supreme Court has never been called

upon to pass upon this provision, all suits coming before it having been brought within the two years prescribed.

In McCready *v.* Sexton & Son, 29 Iowa 356, 4 Am. Rep. 214, a similar provision was involved, the period of limitation being three instead of two years as provided by our statute. The court held that the clause making the treasurer's deed conclusive evidence of the regularity of all prior proceedings was unconstitutional, as depriving a person of his property without due process of law, so far as respects the essential prerequisites for the exercise of the taxing power, such as the assessment, levy, sale and the like; as to non-essentials, or matters merely directory it was declared to be constitutional.

WESTERN UNION TELEGRAPH CO., INC., *v.* BILISOLY.

June 11, 1914.

[82 S. E. 91.]

Commerce (§ 8*)—Interstate Commerce—Regulation—Effect.—Act Cong. June 18, 1909, c. 309, 36 Stat. 539, which placed telegraph companies, so far as interstate business was concerned, under the direct supervision of the interstate Commerce Commission, rendered inapplicable to such business state statutes imposing a penalty upon telegraph companies for failure to promptly transmit messages, although such statutes had been upheld, even as to interstate messages, until Congress acted.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

Error to Circuit Court of City of Norfolk.

Action by E. A. Bilisoly against the Western, Union Telegraph Company, Incorporated. There was a judgment for plaintiff, and defendant brings error. Reversed.

Hughes, Little & Seawell, of Norfolk, for plaintiff in error
Robert W. Shultice, of Norfolk, for defendant in error.

HARRISON, J. This action was brought by E. A. Bilisoly against the Western Union Telegraph Company to recover the statutory penalty for alleged delay of a certain telegraphic message, known as a "night letter."

It appears that the message was sent from the city of New York on the night of December 19, 1912, by Messrs. Kemble and Mills, of that city, to E. A. Bilisoly, at Norfolk, Va. This message was received at the Norfolk office of the telegraph company about 3 o'clock on the morning of December 20, 1912.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.